

What is the nature and extent of claimant's injuries resulting from the alleged accident on June 20, 2007? Claimant alleges that she suffered permanent injuries to her right knee, left knee and low back, as the result of a fall occurring on the above claimed date of accident or as the result of a worsening of her injuries from the limp which occurred after the accident. Respondent contends that claimant suffered only an injury to her right knee. The problems to her left knee and low back were either the result of preexisting conditions or were not proven in this record as stemming from the work-related accident.

The parties agreed both to the ALJ and to the Board at oral argument that claimant suffered only one disability, although experiencing two traumatic incidents. It was agreed that the November 28, 2007, accident resulted in only temporary aggravations of claimant's alleged injuries and any disability to claimant would be the result of the June 20, 2007, accident. Any permanent problems associated with the November 28, 2007, accident were the natural consequence of the earlier accident.

FINDINGS OF FACT

Claimant began working for respondent on May 15, 2007, as a sales representative, selling advertising for local movie theaters. On June 20, 2007, while working in St. Louis, Missouri, claimant was injured when she fell while walking down some stairs. Claimant landed on her knees. Claimant sought treatment at an emergency room at St. Joseph Medical Center in Wentzville, Missouri. X-rays of her knees were taken, but no other treatment was provided. Claimant reported the accident the next day, but no medical treatment was provided until claimant saw board certified orthopedic surgeon Gerald R. McNamara, M.D., on July 20, 2007. Dr. McNamara ordered an MRI of claimant's right knee. The findings were consistent with a medial meniscus tear and articular cartilage disease in the medial compartment. Claimant underwent an arthroscopy of her right knee on August 31, 2007, where the doctor performed a partial medial meniscectomy and a debridement of the knee joint. Dr. McNamara continued to treat claimant until April 10, 2008.

Claimant initially complained of bilateral knee pain, with the right being significantly worse than the left, during Dr. McNamara's July 20, 2007, evaluation. The left knee is not again mentioned until December 27, 2007, when bilateral knee pain is again discussed. No treatment of the left knee was ever provided. Claimant did complain of left hip pain during the March 5, 2008, evaluation, which was diagnosed as trochanteric bursitis. On March 5, 2008, Dr. McNamara diagnosed right knee injury and left SI pain. He was referring to the SI joint in the low back. And Dr. McNamara indicated that it is a possibility that the problems claimant was suffering in her back were the result of the natural progression of her condition due to walking with a limp. Dr. McNamara rated claimant at 13 percent to the right lower extremity for the injuries suffered to claimant's right knee. No rating was provided for the left knee or low back. It is also noted that Dr. McNamara makes no mention of which edition of the *AMA Guides* he used in determining claimant's permanent impairment.

Claimant alleges a second work-related accident on November 28, 2007, while she was working in the St. Louis area. Claimant testified that she was at a Denny's when she tripped over a rug and landed on her right knee again. Claimant testified that this fall temporarily aggravated her right knee and low back pain. Claimant did not testify that she landed on her left knee during this second accident, and acknowledged that she suffered no added pain in the left knee resulting from this accident. As noted above, there

is no claim of permanent impairment from this accident. However, claimant testified at her discovery deposition that her back problems began after the November 28, 2007, incident at Denny's. But, she also testified that she first noticed back problems at home after the surgery on her right knee. Claimant also testified at the regular hearing that she had back pain within several days of the June 20, 2007, accident. The medical records of Dr. McNamara from December 3, 2007, do not mention a second accident on November 28, 2007. Claimant testified that she sought chiropractic treatment for her back pain after each accident, but no chiropractic records are contained in this record.

Claimant was referred by her attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an evaluation on two occasions. The first examination occurred on December 26, 2007. Dr. Prostic diagnosed claimant with bilateral knee pain, right worse than the left; and low back pain. X-rays indicated severe joint space narrowing bilaterally in claimant's knees with lateral facet overhang of each patella and mild disc space narrowing at L5-S1 with calcified fibroids noted. Interestingly, no mention of the accident on November 28, 2007, is contained in the December 26, 2007, report. Dr. Prostic again examined claimant on May 27, 2008. At that time, he diagnosed claimant with bilateral knee pain and low back pain involving a sprain and strain of her lumbar spine. Claimant had degenerative arthritis of both knees and will eventually require arthroplasty bilaterally. Dr. Prostic found no obvious neurologic deficit during his examination of claimant. Claimant was rated at 25 percent to each knee and 3 percent to the whole person for the low back pain. Dr. Prostic determined that claimant's permanent impairments stemmed from the June 20, 2007, accident.

Claimant was referred by respondent to board certified physical medicine and rehabilitation specialist Eden Wheeler, M.D., for an evaluation on April 2, 2008. After reviewing medical records and performing a physical examination of claimant, Dr. Wheeler diagnosed low back pain consistent with left S1 joint dysfunction, bilateral knee pain with degenerative joint disease, a history of right medial meniscectomy and cervical and trapezius myofascial pain. Claimant reported that she first experienced low back pain in December 2007. However, a review of claimant's medical records by Dr. Wheeler failed to find any low back complaints associated with the November 28, 2007, injury. Dr. Wheeler also testified that claimant did not display an antalgic gait during the examination. Dr. Wheeler opined that claimant's low back problems were not the result of either of the alleged accidents during claimant's employment with respondent. Dr. Wheeler also stated that the medical records did not support a finding that claimant aggravated either knee during the November accident. Dr. Wheeler did acknowledge that it was possible for a person with knee problems to begin to have low back difficulties if their gait is altered. Claimant had complained of end of day gait disturbances. Dr. Wheeler's evaluation of claimant was in the morning. Claimant told Dr. Wheeler that she had not had prior knee problems.

Claimant was referred by the ALJ for an independent medical evaluation (IME) to the Dickson-Diveley Orthopedic Clinic with the evaluation to be made by the first available physician. The Order instructed the physician to comment on permanent physical impairment to claimant's lower extremities and spine, including any functional impairment resulting from the alleged work-related injuries of June 20, 2007, and November 28, 2007, but not on whether any such injuries are related to the employment.¹ The logic of ordering an IME with an independent physician, in a case where there are multiple injuries claimed, with multiple dates of accident and disputes regarding the cause of the alleged injuries, but instructing the IME doctor to avoid providing a causation opinion, escapes the Board. An IME doctor's objectivity and unbiased opinion would appear to be the perfect tool to determine the cause of claimant's multiple problems and how they might or might not relate to the alleged accidents.

As the result of the Order, orthopedic surgeon Thomas L. Shriwise, M.D., evaluated claimant on June 18, 2009. Claimant complained of bilateral knee pain and back pain, which all started on June 20, 2007, when she fell going down some stairs. The report also states that the low back pain began a month or two later and that claimant had an intermittent limp ever since the accident. Claimant also advised Dr. Shriwise that she had suffered the second fall on November 28, 2009, [sic]² at Denny's. Claimant told the doctor that her left knee pain had increased since that fall, yet claimant admitted at regular hearing that she suffered no increase in symptoms to the left knee resulting from that fall. Claimant was diagnosed with moderate to severe joint space narrowing medially in both knees, small posterior osteophytes off the medial femoral condyles and a mild lateral patellar tilt. X-rays of the lumbar spine displayed moderate calcification but no significant lumbar disk space narrowing and no spondylolisthesis. Claimant was rated at 20 percent to the left lower extremity and 17 percent to the right lower extremity for knee involvement. Claimant was also rated at 3 to 5 percent to the whole person for her low back complaints. The ratings were provided pursuant to the fourth edition of the *AMA Guides*.³

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

¹ It is not known how a physician can comment on whether a claimant has a permanent impairment from the alleged work-related injuries without determining which injuries are work related.

² In Dr. Shriwise's June 18, 2009, report, it is typed as "November 28, 2009", but the correct date is November 28, 2007.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

⁴ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁷

It is not disputed that claimant suffered two accidents, one on June 20, 2007, and the second on November 28, 2007. It is also not disputed that any permanent impairment stems from the June 20, 2007, accident, with the November accident being only a temporary aggravation of claimant's injuries. The extent of those injuries remains hotly contested. The right lower extremity accident is acknowledged by respondent with the nature and extent being argued. Dr. McNamara rated the right lower extremity but failed to identify the version of the AMA *Guides* utilized in reaching his determination.

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 2006 Supp. 44-501(a).

⁷ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁸

The lack of an indication as to which edition of the AMA *Guides* Dr. McNamara used causes the opinion of Dr. McNamara to be rejected by the Board. Dr. Prostin rated claimant's right lower extremity at 25 percent, while Dr. Shriwise rated the extremity at 17 percent. While Dr. Wheeler failed to provide a permanent rating to the right lower extremity, she still assumed that the knee injury stemmed from the work-related accidents. The ALJ, in reviewing the record, found the opinion of the court appointed independent medical examiner, Dr. Shriwise, to be the most credible. The Board agrees and affirms the determination by the ALJ that claimant suffered a 17 percent permanent partial disability to the right lower extremity.

The left knee is more problematic. Claimant has contended all along that she suffered injury to that extremity from the June fall. Claimant advised Dr. McNamara of bilateral knee pain at the first evaluation, but has received no medical treatment for that injury. Dr. McNamara did not rate the knee, finding no permanent injury or impairment from the work-related accidents. However, Dr. Wheeler again acknowledged that she assumed that the knee injuries were related to the work accidents. Both Dr. Prostin and Dr. Shriwise found claimant to have suffered permanent impairment to the left knee from the work-related accidents, with Dr. Prostin assessing a 25 percent functional impairment to the lower extremity and Dr. Shriwise assessing a 20 percent functional impairment. The Board finds that claimant has proven that she suffered a permanent injury to her left lower extremity from the fall on June 20, 2007. The Board further finds that the opinion of Dr. Shriwise is the more convincing and adopts the 20 percent lower extremity functional impairment opinion for the purposes of this award. The Award of the ALJ is modified accordingly.

The Board must next determine what, if any, permanent impairment claimant has suffered with regard to the low back claim. Claimant has alleged that her back symptoms began within a few days of the June 20, 2007, accident, or at home, or shortly after the right knee surgery, or in September of 2007, or in December of 2007. Claimant failed except on one occasion eight months after the accident to mention the low back complaints to Dr. McNamara during the nine months he was her authorized treating physician. Dr. Wheeler found claimant's back complaints to be suspect as they were based on subjective complaints only. Both Dr. Shriwise and Dr. Prostin diagnosed calcification in claimant's lumbar spine, and Dr. Prostin attributed his findings solely to the June 20, 2007, accident. However, claimant's testimony with regard to the start of these back symptoms raises a serious question as to the credibility of her complaints. The ALJ specifically found claimant to lack credibility due to the problems associated with her testimony about prior injuries, prior accidents, prior criminal convictions and even the method with which she was

⁸ K.S.A. 44-510e(a).

being paid. Only after being provided proof of these many contradictory statements did claimant acknowledge the inaccuracies of her testimony. Again, claimant's credibility is called into question. The Board finds that any connection between claimant's low back and the work-related accidents must, to a significant degree, hinge on claimant's testimony and, therefore, her credibility. In this regard, claimant fails. While the record supports the fact that she has permanent problems with her back, this record cannot support a work-related connection to those problems. Claimant's request for a permanent impairment award for her low back is denied. The Award of the ALJ is affirmed on this issue.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the award of a 17 percent permanent partial impairment of function to the right lower extremity at the level of the leg; modified with regard to the denial of an award for the left lower extremity at the level of the leg, and claimant is awarded a 20 percent permanent partial impairment of function for that extremity; and affirmed with regard to the denial of an award for the alleged injury to claimant's low back. Additionally, as above stipulated, claimant is denied any permanent disability as the result of the accident occurring on November 28, 2007. Claimant would be entitled to any medical expenses incurred as the result of that accident. However, at oral argument to the Board, the parties stipulated that all of the medical expenses and temporary total disability compensation incurred in this matter stem from the accident which occurred on June 20, 2007.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated February 12, 2010, should be, and is hereby, affirmed with regard to the award of a 17 percent permanent partial functional disability to the right lower extremity at the level of the leg and with regard to the denial of an award for the alleged injury to claimant's low back, but modified to award claimant a 20 percent permanent partial functional disability to the left lower extremity at the level of the leg.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Alexandra Trozzolo, and against the respondent, Access Integrated Technologies, and its insurance

carrier, Federal Insurance Company, for an accidental injury which occurred June 20, 2007, and based upon an average weekly wage of \$409.47.

Right Lower Extremity

Claimant is entitled to 9 weeks of temporary total disability compensation at the rate of \$272.99 per week totaling \$2,456.91, followed by 32.47 weeks of permanent partial disability compensation at the rate of \$272.99 per week totaling \$8,863.99 for a 17 percent permanent partial disability to the right upper extremity at the level of the leg, making a total award of \$11,320.90.

As of the date of this Order, the entire amount of this award is due and owing and ordered paid in one lump sum less any amounts previously paid.

Left Lower Extremity

Claimant is entitled to 40 weeks of permanent partial disability compensation at the rate of \$272.99 per week totaling \$10,919.60 for a 20 percent permanent partial disability to the left upper extremity at the level of the leg.

As of the date of this Order, the entire amount of this award is due and owing and ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant

Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge